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Section 37

An Update on “Let’s Make a Deal” Planning

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1. Introduction and Background

Section 37 of the *Planning Act*, R.S.O. 1990, c. P.13, as amended (the “*Act*”) permits a municipality to pass a by-law under Section 34, authorizing increases in the height and density of a development in exchange for the provision of “facilities, services or matters” as set out in the by-law.

Subsection 37(2) makes it clear that there must be an Official Plan in effect containing bonusing provisions relating to the authorization of increases in height and density. However, there have been somewhat contradictory Ontario Municipal Board (“OMB” or the “Board”) decisions regarding the interpretation of this subsection.¹

Section 37 enables a municipality to come to an agreement with a developer whose proposed development requires increases in height and/or density, where the developer agrees to provide “facilities, services or matters” in exchange for the increase in height and/or density. The use of the term “elects” in subsection 37(3) suggests that such an agreement must be consensual and the Board has held that the election must be made before the by-law is passed under Section 34 of the *Act*.² It is also interesting to note that the enforceability provision contained in subsection 37(4) is identical to that for subdivision agreements under Section 51(26) of the *Act*. Many view Section 37 agreements to be the “vertical” equivalent of subdivision agreements.

Section 37 does not outline a detailed or enumerated list of the nature of the “facilities, services or matters” to be provided under Section 37, in exchange for increases in height and/or density. The issue has come before the Board on several occasions. In particular, the question of whether the benefits requested by the municipality must be connected in some way to the proposed development has been considered in several decisions and will be the focus of this paper. Based upon a series of decisions, it now seems clear that a “real and demonstrable connection” is required.³

Just as with subdivision agreements, subsection 37(4) allows for the agreement to be registered on title and gives the municipality the power and authority to enforce the provisions of the agreement on successive owners. Notwithstanding the fact that Section 37 agreements run with the land, municipalities often require assumption agreements from successors in title.

¹ See *Re Property House Corp. (Canada)* (1991), 6 M.P.L.R. (2d) 214. (sub nom. *Re York (City) Official Plan Amendment 105 and Zoning By-law 2171-91 (Re)*), 27 O.M.B.R. 41, [1991] O.M.B.D. No. 1951. However see also *Tye v. East York (Borough) Committee of Adjustment* (1992), 27 O.M.B.R. 479, 10 M.P.L.R. (2d) 310 and *Ernst & Young (Re)* (1993), 14 M.P.L.R. (2d) 196 (OMB), for a different interpretation. See also *Toronto (City) v. Minto BYG Inc.* (2001), 20 M.P.L.R. (3d) 123 (Ont. S.C.J.).

² *Re Copthorne Holdings Ltd.* (1987), 36 M.P.L.R. 122 (OMB).

³ See *Irber Holdings Limited v. Toronto (City)* (2005), 49 O.M.B.R. 178 (OMB); *Toronto (City) v. Minto BYG Inc.* (2001), 20 M.P.L.R. (3d) 123 (Ont. S.C.J.) and *Sterling Silver Development Corp. v. Toronto (City)*, [2005] O.M.B.D. No. 1313 (OMB).

2. Establishing the Requirement for a Nexus

A number of OMB decisions have reviewed and struggled with the issue of whether Section 37 benefits must be directly related to the proposed development.

In the *Minto BYG* case⁴, Minto applied to the City of Toronto (the “City”) for an amendment to the Official Plan to allow for increased height and density and for an amendment to the City’s zoning by-law to implement the proposed official plan amendment. At the OMB hearing, the only issue before the Board was “whether bonusing provisions should form part of the amendments...and if so, in what amount.”⁵

The City’s position was that the Board should require Minto to provide appropriate Section 37 benefits in exchange for the increased height and density and without such a requirement “the application fails to meet the complete test of good planning in so far as it does not comply with the Official Plan”.⁶ On the other hand, Minto argued that “the application of Section 37 provisions to the subject development should not result in any further amenities other than those which have been proposed or which are valid conditions of site plan approval”.⁷ With respect to Section 37, the Board recognized that it represents an important tool for the City, enabling “significant funds to be provided by a developer in return for approvals which exceed existing zoning and by-law requirements” and “provides a mechanism to supplement social programs...that are needed.”⁸

In order to determine whether Minto’s application should be approved and whether a requirement should be included in the by-law “to provide public benefits pursuant to Section 37 of the *Planning Act*”, the Board found it necessary to review the history of bonusing payments in the City of Toronto.⁹ The Board first turned to Section 37 of the *Act* itself and noted that it clearly authorizes bonusing arrangements. It acknowledged that the City has indeed relied upon Section 37 since its enactment (as Section 36) in 1983, as a mechanism to secure public benefits. However, such density bonusing agreements had always been the subject of negotiation. In contrast, the Board was now being asked by Minto “to exercise discretion normally afforded to Council and to decide whether public benefits ought to be required and if so, at what level”.¹⁰

One of the main prerequisites of a Section 37 agreement is found in subsection 37(2) of the *Act* which requires the City to have an Official Plan in effect that contains provisions relating to the authorization of increases in height and density of development. Prior to 1993 however, Section 37 “was employed by way of site specific Official Plan amendments as there were no general policies available in the City’s Part 1 Official Plan relating to bonusing”.¹¹ In 1993, the City

⁴ *Toronto (City) Official Plan Residential Development Amendment (Re)* [2000] O.M.B.D. No. 1102 *sub nom. Toronto (City) v. Minto BYG Inc.* (OMB); application for leave to appeal dismissed, [2001] O.J. No. 455 (SCJ).

⁵ *Ibid.*, [2000] O.M.B.D. No. 1102, at para 6.

⁶ *Ibid.*

⁷ *Ibid.*

⁸ *Ibid.*, at para 7

⁹ *Ibid.*, at para 11

¹⁰ *Ibid.*, at para 13

¹¹ *Ibid.*, at para 14

adopted general provisions relating to bonusing in Section 16.21 of its then new Official Plan, and that plan was approved the following year.

Prior to the introduction of general bonusing policies in the City's Official Plan, Section 36 agreements (now Section 37 agreements) were secured on a project by project basis. Through negotiations, the developer would elect to enter into such an agreement pursuant to subsection 37(3) of the *Act*. In the late 1990s, a review of the future use of Section 37 was conducted. The resulting "Implementation Framework" was intended to provide "direction regarding where, when and how Section 37 is to be used and establishes a consistent relationship between cost to the developer of providing public benefits and the value...of the increased density and height. Clarification of what public benefits are to be secured, including the achievement of...balance between local and city-wide benefits, is also part of the framework".¹² It is against this background that the Board in *Minto BYG* determined the merits of the proposed Official Plan and zoning by-law amendments.

Acknowledging that "a necessary prerequisite to the exercise of the authority for requiring the provision of facilities, services or matters under Section 37 is the inclusion of provisions relating to the authorization of increases in height and density of development in the municipal Official Plan", the Board concluded that a Section 34 by-law "should be tested as to the appropriateness and conformity of any such development otherwise permitted, together with the conformity of the appropriateness of such facilities, services or matters required as a result of the excess height and density in relation to established official plan policies."¹³ The Board found these to be the following two related, but severable, tests:

- (i) Increases in height and density must be defensible on good planning grounds; and
- (ii) Contributions requested must be within the clear limits of established policy.¹⁴

After a thorough review of the in-force Official Plan, the Board found that when seeking increases in height or density, the applicant is entitled to some degree of certainty in ascertaining what public benefits it will be required to provide pursuant to Section 37.¹⁵ Furthermore, the Board found that *Minto* met the intent of the Part I Official Plan policies "without the requirement for any further contribution pursuant to Section 37. ... [P]rior to requiring any contribution under Section 37 the City should be able to demonstrate that such contribution falls within the scope of the criteria contained in the policy."¹⁶

The Board went on to reject the notion that the "Implementation Framework" should form the basis for this application "in either determining or requiring an appropriate level of public benefits". Rather, that determination "must be made within existing policies as set out in the City's Official Plan".¹⁷ At paragraph 48 of its decision, the Board then identified the following

¹² Ibid., at para 20

¹³ Ibid., at para 24

¹⁴ Ibid

¹⁵ Ibid., at para 44

¹⁶ Ibid

¹⁷ Ibid., at para 47; See also *Toronto (City) Official Plan Amendment No. 1043 (Re)*, [2000] O.M.B.D. No. 1282 (OMB) (*Omni at the City Centre Inc.*).

findings as being relevant to its decision to grant Minto's appeal thereby approving of the Official Plan amendment and ordering that the City's zoning by-law be amended:

- a. A requirement for a contribution pursuant to Section 37 must fall within the scope of a Section 34 by-law amendment.
- b. Council has the discretion on a case by case basis, whether or not to require contributions pursuant to Section 37 as long as there exist applicable Official Plan policies to support those contributions.
- c. Where contributions are required and the proponent elects not to make the required contribution, an appeal lies to the OMB, on the basis first, that the application meets all the applicable tests under Section 34 of the *Act*; and second, that the request for contributions under Section 37 is not in conformity with the Official Plan.
- d. With regard to the subject application, the City has approved Official Plan policies in Section 16.21 which respond to Section 37(2) of the *Planning Act* and provide a basis for assessing the conformity of this appeal to those policies.
- e. The policies relevant to this application are contained in Section 16.21(a), which is specific to a single development proposal for a re-zoning to accommodate excess height and/or density. Given the agreement of the parties that the particulars of building form and the physical environment are not in contention, it is appropriate for the City to consider contributions pursuant to Section 37.
- f. Whether contributions should be authorized must be judged on the beneficial effects of such contributions to the development proposal and it lies with the municipality to demonstrate the connection between the proposal and the benefits.
- g. In the absence of a clear demonstration by the City of the basis for the benefits to be provided and the contributions requested, it remains the obligation of the applicant to meet the criteria set out in the Official Plan. In this instance, Minto fully addressed the criteria contained in Section 16.21(a).
- h. The Board found that there was no proven need to require contributions from Minto because there were no benefits to the development project, as prescribed under the City's Official Plan policies in Section 16.21(a).
- i. Given the significance and the potential impact of the authority granted to municipalities under Section 37 of the *Act*, and the objective of the legislation to require municipalities to spell out the exercise of that authority for clear, equal and consistent application without arbitrariness, including where and when contributions are required, the Board found that the latitude exercised by staff to require contributions beyond what is obvious from policy is not supportable. Neither was the Board prepared, in this instance, to interpret the policy and exercise this latitude.
- j. Given that the Board found the proposed amendments appropriate without the contribution of further public benefits, it was not necessary to determine a level of benefits.

- k. The Board found that the Official Plan and zoning amendments and the proposed Site Plan application were appropriate and constituted good land use planning pursuant to the provisions of the *Planning Act*.

In summary, the Board, in the *Minto BYG* case held that Minto was not required to provide benefits in addition to those already offered and agreed upon based in part on the fact that the City was unable to establish a connection between the contributions requested and the proposed development. However, in 2003, the issue of whether a connection is required between the benefit and development came before the Board again, and this time, a different conclusion was reached that appeared to be contrary to the *Minto* decision.

In the *1430 Yonge Street* case,¹⁸ the Board, rejecting the proposition that Section 37 amenities have to be directly related to a development proposal, found that the benefits provided in return for increases in the height and density of a development were not required to be located on the subject property and furthermore, were not required to be related to the particular development; rather, the “facilities, services or matters” must simply be a benefit to the public in the area. On the issue of Section 37 bonusing agreements, the Board stated the following:

The final issue is one pertaining to the requirement that certain conditions be imposed on the development arising from Section 37... “bonusing” provisions. These provide that the City can seek amenities or benefits from the developer, including cash payments for public amenities, commensurate with the additional density or development rights achieved beyond those permitted as of right. Normally the items are secured on consent by the City and the developer, and are incorporated into an agreement. In cases where they cannot, the Board can impose them as a benefit to be derived from the development permission.¹⁹

The City was seeking provisions from the developer for an alternate vehicle entrance, cash payments for park improvements in the area and a dog drinking fountain in a nearby public space. The developer agreed to the first, but argued that the park improvements and dog drinking fountain were unwarranted by the additional density and unrelated to the development.²⁰

In reference to Section 16.21 of the City’s Official Plan, the developer conceded that a Section 37 agreement could be used by the City to secure the “alternate vehicle entrance” as a means of securing one of the “positive features of the development proposal”.²¹ However, the same was not true with respect to the “dog fountain” and park improvements. On the other hand, the City took the position that the benefits requested do not have to be “related or justified by the project, but need simply be a benefit to the public offered in exchange for the permission to develop at a height and density above what the plan and the by-law permit”.²²

¹⁸ *Toronto (City) Official Plan Residential Building amendment (Re)*, [2003] O.M.B.D. No. 926 (OMB), (referred to as “*1430 Yonge Street*”).

¹⁹ *Ibid.*, at para 18

²⁰ *Ibid.*, at para 19

²¹ *Ibid.*, at para 22

²² *Ibid.*

Generally, the Board seemed to agree with the City and stated the following with respect to the theory behind Section 37 bonusing:

Normally Section 37 provisions are obtained by mutual consent and secured by an agreement - not imposed by the OMB... It is the legal extension of an...age-old practice of securing some public benefit in return for a permission that creates betterment or increases land value. Seen in this light, the benefit need not be related to the project or caused by it...it is not necessary that the park be used by the residents of the project - it is not a park levy. What is relevant is that in return for additional development rights granted to the developer, the exercise of which may have social costs to the public in the area, the public receives some tangible benefit or amenity to offset the cost. If the area residents must put up with increased height...and congestion caused by the developer getting additional development rights, the public should receive some tangible benefit.²³

However, where there is no such consent, the question becomes: “how much can the Board reasonably compel the developer to pay in the absence of an agreed amount?”²⁴ The Board concluded that the City’s estimate was reasonable and approved the Official Plan and zoning by-law amendments including the provisions requested by the City.

Shortly thereafter, in *Irber Holdings Limited*²⁵, the issue of whether a connection is required between the Section 37 benefits sought and the proposed development came before the Board once again. This time, the Board had the opportunity to consider both the *Minto BYG* decision as well as the *1430 Yonge Street* decision and preferred the conclusions reached by the Board in the former, over the reasoning in the latter. According to the Board in *Irber Holdings*, “there must be a real and demonstrable connection between the Section 37 benefit being requested and the positive features of the development proposal, as stated in the Official Plan policy.”²⁶

The position taken by the Board in *Irber Holdings* received substantial support in 2005, with *Sterling Silver Development Corp. v. Toronto (City)*²⁷. In the *Sterling Silver* decision, the Board explained and conducted an extensive review of the *Minto BYG*, *1430 Yonge Street* and *Irber Holdings* decisions. The Board concluded that it could not support the “imposition of other Section 37 benefits on the owner, unless there is a nexus between the benefit demanded and the development proposed.”²⁸ (emphasis added)

With respect to community benefits and Section 37, the Board noted that two layers of obligation are triggered by development - payment of Development Charges (DCs) and dedication of parkland (or provision of cash in lieu thereof). The Board then turned to the issue of whether the City can demand an additional third layer of obligation, as it did of *Sterling Silver*. Moreover, the Board asked whether, in the absence of an agreement on Section 37 benefits, the City could

²³ Ibid., at para 23

²⁴ Ibid., at para 24

²⁵ *Toronto (City) Official Plan Redesignate Lands Amendment (Re)*, [2005] O.M.B.D. No. 1 (OMB), (referred to as “*Irber Holdings*”).

²⁶ Ibid., at para 20

²⁷ Ibid., at para 24

²⁸ [2005] O.M.B.D. No. 1313 (OMB), (referred to as “*Sterling Silver*”).

impose a requirement for Section 37 benefits of its own choosing, without which the development can be refused? And if so, can the City, on an appeal to the Board, call upon the Board to impose the City's Section 37 benefits as a precondition of development?²⁹

The Board in *Sterling Silver* went on to state that “any question regarding a possible contradiction” arising from the *Minto BYG* and *1430 Yonge Street* decisions was resolved with the 2005 *Irber Holdings* case which “expressly rejected the reasoning in *1430 Yonge Street*” and instead relied upon the *Minto BYG* decision.³⁰ The Board found the reasoning in *Minto BYG* to be consistent with fundamentals and noted that although municipalities are desperate for revenues, “the *Planning Act* is not a revenue statute” and “there must be a nexus between the development and the Section 37 benefits, demonstrating that the benefits pertain to the development (whether on-site or off), not to unrelated municipal projects (no matter how meritorious)”.³¹

Following *Minto BYG* and *Irber Holdings*, the Board in *Sterling Silver* found “that it was incumbent on the City to demonstrate the connection between the Section 37 benefits being requested and the positive features of the development proposal.”³² Moreover, the Board confirmed that additional Section 37 obligations could indeed be imposed, beyond those volunteered by the owner/developer, if there is “a real and demonstrable connection”. Accordingly, the decision of the Board in *Sterling Silver* makes it very clear that there must be a “nexus” between the development and the Section 37 benefit requested. Therefore, it is the community benefit, secured by the Section 37 agreement, which ensures that the application meets the test of good planning.

3. Building on the “Nexus” Decisions

Several OMB decisions since *Minto BYG*, *Irber Holdings* and *Sterling Silver* have addressed the issue of whether Section 37 benefits must be connected to the proposed development and suggest that the OMB has re-iterated the requirement that there must be a real and demonstrable connection between the Section 37 benefits requested and the development proposal.

Following the nexus principle, the Board in *Davenport Three Develco Inc. v. Toronto (City)*³³ held that the park improvements required by the City did not meet the necessary nexus to the development criteria and that the proposed improvement of the intersection of Bay Street and Davenport Road was a general improvement to the area street system and not related to the proposed development. The Board held that the City failed to establish the necessary nexus between the Section 37 benefits it sought and the proposed development, while the Section 37 benefits proposed by Davenport Develco displayed a clear nexus to the proposed development.

The Board in the *Sunny Hill Gardens Inc. v. Toronto (City)*³⁴ decision echoed the *Minto BYG* decision that the use of Section 37 must be grounded in “fair, clear, transparent, predictable,

²⁹ Ibid., at para 3

³⁰ Ibid., at para 70

³¹ Ibid., at para 80

³² Ibid., at para 82

³³ [2006] O.M.B.D. No. 637.

³⁴ [2006] O.M.B.D. No. 595.

specific requirements that are set out in the Official Plan”³⁵ and are not arbitrary in their application and that an applicant should know what will be expected by way of Section 37 benefits if increases in height and density are approved. The Board held that where “Section 37 benefits that are sought by the City do not meet these tests, then any Section 37 agreement should be entirely voluntary and not imposed.”³⁶ The City had requested a total of \$398,000.00 worth of Section 37 benefits as a condition of any approval of a proposal at the northwest corner of Pears Avenue and Avenue Road but the Board in refusing to support the requested benefits stated that they amount to “a wish list prepared on an *ad hoc* basis as a result of an application filed for a rezoning.”³⁷

In *1640830 Ontario Inc. v. Toronto (City)*³⁸, the City requested \$400,000.00 in Section 37 contributions. The Board held that the benefits requested by the City were not set out in the Official Plan or Part II Plan. The same Section of the Official Plan in force at the time of the *Minto BYG* decision was in question in this decision. Applying the *Minto BYG* and *Sunny Hill Gardens* analysis the Board stated that the Appellant could not reasonably be expected to know the benefits that would be expected of it as a result of the granting of additional height and density. The Board stated that pursuant to the *Minto BYG* decision, the onus is on the City to show the connection between the proposed development and requested benefits.

In *Elderbrook Developments Ltd. v. North York (City)*,³⁹ the City sought a contribution of \$500.00 per proposed dwelling unit towards community amenities and 0.5% of the gross construction costs for public art. The Board preferring the evidence of the City with respect to the community amenities agreed that the community centre was something the community had clearly needed and been trying to secure since an earlier attempt to do so in 1996. The Board stated that the community centre would benefit the entire community, including the proposal, and constituted a fair return for the increased zoning permissions relating to the total number of units. However, with respect to the public art contribution, the Board preferred the evidence of the Applicant and held that the contribution was not required.

In *Daniels HR Corp. v. Toronto (City)*⁴⁰ the North York Community Council augmented the benefits proposed in a staff report by recommending that Daniels, in addition to the proposed benefits, provide purchasers of the future development with a one-year transit pass. Daniels agreed to the provisions relating to the recreational space exemption, the transit pass (which was reduced at Council to a six-month pass), and the payment for traffic monitoring. However, City Council added the additional requirement that Daniels pay to the City “benefits in an amount similar to benefits contributed by other developments in the area in an amount satisfactory to the City Solicitor and to be used for community centre purposes in the area.”⁴¹ At the Board the City argued that an additional contribution towards a community centre of \$338,000.00 is appropriate and contemplated under the Official Plan policies. The Board held that the voluntary contribution already agreed to by Daniels, that is, the transit pass (which the Board allowed to be converted

³⁵ Ibid., at para 31

³⁶ Ibid., at para 31

³⁷ Ibid., at para 33

³⁸ [2007] O.M.B.D. No. 914.

³⁹ [2005] O.M.B.D. No. 980.

⁴⁰ [2007] O.M.B.D. No. 176.

⁴¹ Ibid., at para 10

into a monetary contribution to the City) and traffic monitoring, is appropriate and consistent with the applicable Official Plan. The Board distinguished the Daniels proposal from other development proposals relied on by the City because an Official Plan amendment was not required. The Board also noted that voluntary contributions made by other developers are precisely that, “voluntary and nothing more.”⁴²

The Board in *584952 Ontario Ltd. v. Toronto (City)*⁴³ held that there was no basis for the requested Section 37 benefits where the City requested that the Board impose a requirement on the Applicant to provide benefits in the form of a six-month transit pass to each purchaser, funding of a transportation study and construction of an above or below grade connection to Downsview subway station. The Board noted that the City called no witnesses and provided no evidence in support of the requested benefits. Furthermore, the Board stated that the Official Plan conditions and requirements make no mention of the transit pass or the study to accommodate the adjacent development. Finally, the Board noted that the sole trigger in the Official Plan that envisions Section 37 benefits is a change in density and no such change was sought in this matter.

4. City of Toronto Official Plan

The new City of Toronto Official Plan⁴⁴, has clearly been influenced by the OMB decisions reviewed above. Policy 1 of Chapter Five states that, pursuant to Section 37, zoning by-laws may be enacted to permit more height and/or density than is otherwise permitted by the zoning by-law in return for the provision of community benefits in the form of capital facilities to be set out in the by-law and subject to the following:

- (a) The capital facilities must bear a reasonable planning relationship to the increase in the height and/or density of a proposed development including, at a minimum, having an appropriate geographic relationship to the development and addressing planning issues associated with the development; [emphasis added]
- (b) The development must constitute good planning, be consistent with the objectives and policies of this Plan, and comply with the built form policies and all applicable neighbourhood protection policies; and
- (c) The use of Section 37 must be contingent upon adequate infrastructure to support the development.

Policy 2 indicates that (subject to Policy 3), an owner may elect either to develop at such increased height and/or density as may be permitted by the Official Plan in return for providing specified capital facilities in accordance with Policy 1 or else develop in accordance with the height and density permitted by the Zoning By-law in the absence of any such increase(s). The policy then states that where the owner elects to provide the capital facilities, they will be secured in one or more agreements that are registered on title to the lands.

⁴² Ibid., at para 33

⁴³ [2007] O.M.B.D. No. 827.

⁴⁴ City of Toronto Official Plan, September 2007.

Policy 3 states that (except as contemplated by Policy 5), if the applicable zoning has not been updated to implement the Plan or where a change of use is proposed, the City will consider whether additional height and/or density beyond that permitted by the Zoning By-law for the use is warranted without recourse to Section 37. The policy then explains that where a Secondary Plan or area specific policy contains an explicitly stated base value from which increased height and/or density may be permitted in return for certain capital facilities, the base value will be used instead of the density permitted by the Zoning By-law.

Policy 4 indicates that (except where contemplated by Policy 5), Section 37 may be used for proposed developments, except non-profit developments, with more than 10,000 square metres of gross floor area where the zoning by-law amendment increases the permitted density by at least 1,500 square metres and/or significantly increases the permitted height. Where the Zoning By-law measures residential density in units per hectare, the units are to be converted to gross floor area at the rate of 100 square metres per unit in order to determine whether these thresholds are exceeded.

Policy 5 states that (despite Policies 3 and 4), Section 37 may be used, irrespective of the size of the project or the increase in height and density:

- (a) To conserve heritage resources or rental housing in accordance with the provisions of the Official Plan;
- (b) To replace rental housing in accordance with the provisions of the Official Plan;
- (c) Where Secondary Plan or area specific policies in this Plan contain Section 37 provisions that prevail;
- (d) As a mechanism to secure capital facilities required to support development; or
- (e) As may otherwise be agreed upon, subject to the policies contained in this Section .

Policy 6 states that Section 37 community benefits are capital facilities and/or cash contributions toward specific capital facilities, above and beyond those that would otherwise be provided under the provisions of the *Planning Act* or the *Development Charges Act* or other statute, including:

- (a) The conservation of heritage resources that are designated and/or listed on the City of Toronto Inventory of Heritage Properties;
- (b) Fully furnished and equipped non-profit child care facilities, including start-up funding;
- (c) Public art;
- (d) Other non-profit arts, cultural, community or institutional facilities;
- (e) Parkland, and/or park improvements;
- (f) Public access to ravines and valleys;

- (g) Streetscape improvements on the public boulevard not abutting the site;
- (h) Rental housing to replace demolished rental housing, or preservation of existing rental housing;
- (i) Purpose built rental housing with mid-range or affordable rents, land for affordable housing, or, at the discretion of the owner, cash-in-lieu of affordable rental units or land;
- (j) Local improvements to transit facilities including rapid and surface transit and pedestrian connections to transit facilities;
- (k) Land for other municipal purposes;
- (l) Substantial contributions to the urban forest on public lands; and
- (m) Other local improvements identified through Community Improvement Plans, Secondary Plans, Avenue Studies, environmental strategies, sustainable energy strategies, such as deep lake water cooling, the capital budget, community service and facility strategies, or other implementation plans or studies.

Policy 7 states that Section 37 community benefits will be selected on the basis of local community needs, intensification issues in the area, the nature of the development application, and the strategic objectives and policies of this Plan and that priority will be given to the provision of on-site or local community benefits.

Policy 8 states that where a Secondary Plan or area specific policy identifies additional capital facilities that bear a reasonable planning relationship to greater height and/or density over an area defined in the Secondary Plan or area specific policy, any Section 37 increase in height and/or density anywhere in that defined area, and the community benefits (specified capital facilities or cash contributions toward specified capital facilities) in return therefore, will be tied to the identified capital facilities in the matter prescribed by that Secondary Plan or area specific policy. Furthermore, where appropriate, a quantitative formula prescribing the benefits will be available.

Finally, policy 9 states that all zoning by-law provisions enacted pursuant to Section 37 and agreements in effect at the time that this policy comes into force are authorized by the Official Plan and are deemed to comply with it.

5. Guidelines, Framework and Tracking

Recently, the City of Toronto implemented a new framework for implementing, tracking and administering community benefits obtained through Section 37 of the *Planning Act*. The City has appointed a compliance officer to ensure that:

- (a) Community benefits are provided to the City as set out in Section 37 agreements;
- (b) The Section 37 funds are used in accordance with the agreements; and

- (c) Responses to inquiries from Councillors and staff on the status of community benefits are coordinated.

The City has also implemented a new tracking and electronic document storage system. The system will track community benefits flowing from approved developments. The system will also store relevant documents such as agreements, Community of Adjustment decisions, planning reports, by-laws and OMB decisions and will eventually provide read-only access to the document storage system.

Finally, in late 2007, City Council adopted Implementation Guidelines for Section 37 of the Planning Act and a Protocol for Negotiating Section 37 Community Benefits⁴⁵ (“Guidelines”). The Guidelines are intended to assist in the implementation of the Official Plan policies contained in Section 5.1.1: Height and/or Density Incentives. The introduction to the Guidelines indicates that they must be read in conjunction with the Official Plan policies and that where any conflict arises the Official Plan provisions prevail. The Guidelines also state that the term “community benefits” reflects the City’s priority on providing public benefits within the local community in which the contributing development project is located and that the increase in height and/or density is an incentive to the developer to provide community benefits at no cost to the City.

The Guidelines outline the principles which must be followed when using Section 37 of the Planning Act:

1. The proposed development must represent good planning
2. Community benefits and the increase in height and/or density must be set out in the zoning by-law
3. Section 37 community benefits should be specific capital facilities, or cash contributions to achieve specific capital facilities
4. There should be a reasonable planning relationship between the secured community benefits and the increase in height and/or density in the contributing development
5. No citywide formula, or quantum, exists in the Official Plan or these Guidelines for determining the level of Section 37 benefits
6. Typical community benefits are listed in the Official Plan (Policy 5.1.1.6) but this list is not exhaustive
7. Matters required to support a development may also be secured in a Section 37 agreement as a legal convenience
8. Good architecture and good design are expected of all developments, as a matter of course, and are not eligible Section 37 benefits

⁴⁵ Implementation Guidelines for Section 37 of the Planning Act, as adopted by City Council at Meeting of November 19-20, 2007, City Planning Division, Policy and Research Section.

9. Section 37 cash contributions toward capital facilities should be over and above the facility costs that will be funded through development charges
10. Section 37 is an essential tool for implementing certain Official Plan Housing and Heritage Resources policies when there is an increase in height and/or density
11. The Ward Councillor should always be consulted by City Planning staff prior to any negotiation of Section 37 community benefits
12. City Planning staff should always be involved in discussing or negotiating Section 37 community benefits with developers/owners

6. Conclusion: The True Purpose of Section 37

Some municipalities seem to have a basic misunderstanding as to the true purpose of Section 37. As noted in the Introduction, many practitioners experienced with the *Planning Act* see the process provided for under Section 37 (leading to the Section 37 Agreement) as being the “vertical” equivalent of more “horizontal” Subdivision Agreements under Section 51; that is, the mechanism for putting into force and effect what has been agreed-upon as constituting a component of “good planning” thus allowing for the development of lands in question.

However, some municipalities take the position that a project must already be “good planning” before there is to be consideration of additional public benefits under Section 37. These municipalities suggest that the use of Section 37 is a mechanism that a municipality can decide to use, over and above whether a project constitutes “good planning”. This is a fundamental misapprehension and misunderstanding as to the purpose of Section 37. If an application constitutes “good planning” without the need for public benefits, then the use of Section 37 is not appropriate. It is only in those circumstances when an application may fall below the threshold of “good planning” where, in order to meet the test of good planning, it requires that certain public benefits be provided. Section 37, therefore, is the mechanism by which these public benefits can be provided by the applicant and secured in an agreement registered on title to the property.

As described above, the comprehensive and well-reasoned decision of the Board in *Sterling Silver* and re-iterated in subsequent decisions of the Board confirms and reiterates the fact that it must always be remembered that Section 37 is a Section of the *Planning Act* [emphasis added] and not part of some mythical “Municipal Generation of Revenue Act”.